October 19, 2018

The Honorable Jesse M. Furman
United States District Court for the Southern District of New York
Thurgood Marshall U.S. Courthouse
40 Centre Street, Room 2202
New York, NY 10007

      RE: Plaintiffs' Motion to Present Live Direct Testimony in *State of New York, et al. v. U.S. Dep't of Commerce, et al.*, 18-CV-2921 (JMF).

Dear Judge Furman,

      Pursuant to the Court's October 18 Order and Rule 5(E) of this Court's Individual Rules and Practices, Plaintiffs move for leave from the Court's Scheduling Order of September 17, 2018 (Docket No. 323, ¶ 2) to present direct testimony in person rather than by affidavit from a small number of witnesses at trial. As set forth below, Plaintiffs' request is to present live direct testimony from six witnesses – fact testimony from witnesses representing three (of the 39) Plaintiffs, and four (of the ten) expert witnesses (with one witness presenting both fact and expert testimony). The balance of Plaintiffs' direct testimony, from approximately 22 witnesses, will be presented by affidavit in accordance with the Court's standard practice for bench trials.

      First, the issues presented by this case are complex, and Plaintiffs believe that direct oral testimony from a few select witnesses will provide the Court with a useful framework for trial: these witnesses can explain key technical concepts about Census operations, explain how the addition of a citizenship question will impact those operations, and identify how this change will harm the Plaintiffs.

      Second, the Federal Rules of Civil Procedure recognize the inherent value to presenting direct testimony live. Rule 43(a) provides that "[a]t trial, the witnesses' testimony must be taken in open court . . . ." While Plaintiffs recognize that Rule 611(a) of the Federal Rules of Evidence permits the Court to control the mode and order of examining witnesses, and do not contend that Rule 43(a) requires that direct testimony be live in this case, Plaintiffs submit that allowing testimony from a limited number of the Plaintiffs' fact witnesses and key experts will allow the public to see and learn about essential elements of the case. This point applies with additional force here given the critical importance of the Census to the proper operation and structuring of our representative democracy, and to the faith of the public in that democracy. *See* Order of Sept. 7, 2018, at 8 (Docket No. 308) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring in part and concurring in the judgment)). These considerations are underscored by the fact that this case is brought by eighteen states, the District of Columbia, nine cities, five counties, the U.S. Conference of Mayors, and five other non-governmental organizations for the protection of their residents and members.

      The witnesses in question are identified below.

Steven Choi is the Executive Director for Plaintiff New York Immigration Coalition ("NYIC").
NYIC is the umbrella policy and advocacy organization for nearly 200 groups in New York

State, representing the collective interests of New York's diverse immigrant communities. Mr. Choi will testify regarding NYIC's extensive education and outreach efforts regarding the Census, including its leadership of the New York Counts 2020 coalition, which is the leading organization conducting outreach to immigrant communities to participate in the 2020 Census. Mr. Choi will describe these efforts, as well as the challenges and costs associated due to the heightened fear generated by the citizenship question among immigrant communities of color. Mr. Choi will be able to provide the court with information about how fear of answering the citizenship question among immigrant communities of color has affected NYIC, its member organizations, and the communities they serve. Mr. Choi's testimony will establish Plaintiffs' standing, an issue which the Defendants have contested.

Javier Valdes is the co-Executive Director of Plaintiff Make the Road New York ("MRNY"). MRNY is a non-governmental organization dedicated to empowering immigrant and working-class communities with approximately 22,000 members in the New York metropolitan area. Mr. Valdes will testify about MRNY's membership and the importance of a complete and accurate 2020 Decennial Census to MRNY's members in terms of the allocation of federal resources and political representation. Mr. Valdes will also testify to the heightened climate of fear created by the Trump Administration among the immigrant communities that MRNY serves, and the incremental challenges and costs generated by the addition of a citizenship question to the 2020 Decennial Census for MRNY and its members. Mr. Valdes will also testify concerning the additional resources that MRNY has already been required to divert from other organizational priorities to its Census education and outreach efforts to address concerns from its members and the local community arising from fear of the citizenship question. Mr. Valdes' testimony will establish Plaintiffs' standing, an issue which the Defendants have contested.

Dr. Sunshine Hillygus is a Professor of Political Science and Public Policy at Duke University. Dr. Hillygus is an expert on survey methodology and on Census Bureau surveys, including the Decennial Census, having served for six years on the Department of Commerce's Census Scientific Advisory Committee (CSAC). Among her publications is *The Hard Count: The political and social challenges of census mobilization*, a leading study of the challenges the Census Bureau has faced in enumerating immigrants, racial and ethnic minorities, and other "hard-to-count" populations. Dr. Hillygus will present testimony about foundational concepts of survey design (including the importance of pre-testing) and survey response, including respondent sensitivity, respondent confidentiality, non-response, and non-response follow-up. She will also provide an overview of the available evidence from the Census Bureau, other public survey organizations, and academia regarding the differential impact the addition of a citizenship question is expected to have on response rates of noncitizen households and Hispanics. She will additionally testify regarding the sufficiency of the Census Bureau's testing of the citizenship question; (ii) whether the Census Bureau's follow-up procedures to enumerate households that fail or decline to participate in the Decennial Census will cure the undercount for hard-to-count populations; and (iii) accuracy and confidentiality challenges of the potential use of citizenship data. Because she can explain key foundational concepts, Plaintiffs believe trial presentation will be clearer if Dr. Hillygus can present her direct testimony before cross-examination.

Dr. Matthew A. Barreto is a professor of Political Science and Chicana/o Studies at the University of California, Los Angeles. Dr. Barreto is an expert in public opinion polling and

2

survey methodology, and will present testimony about the survey he designed and conducted, including analysis on the expected impact the addition of a citizenship question will have on response rates of racial and ethnic minorities to the 2020 Census. Because Dr. Barreto's survey design and related analysis are technical, Plaintiffs believe the evidentiary record will be clearer if Dr. Barreto can explain his survey, the methodology underlying it, and how it compares to other quantitative research relied on by the Census Bureau prior to cross-examination. Dr. Barreto is also a rebuttal expert on the sufficiency of the Census Bureau's follow-up plans to enumerate households that fail or decline to participate in the Decennial Census, and whether those measures will cure the differential undercount for racial and ethnic minority populations.

Dr. Joseph Salvo is the Director of the Population Division at the New York City Department of City Planning. He is the City's chief demographer and has been directly involved in census preparations and follow-up operations for almost 40 years. Dr. Salvo will testify about the Census Bureau's non-response follow-up operations, the analysis he conducted of the 2010 Decennial Census, the sufficiency of the Census Bureau's follow-up plans to enumerate households that fail or decline to participate in the Decennial Census, and the resulting differential undercount of certain populations and neighborhoods. Although Dr. Salvo will be presenting a practical application of concepts presented by other experts, because his underlying analysis is technical, Plaintiffs believe the evidentiary record will be clearer if Dr. Salvo can present these issues prior to cross-examination. Dr. Salvo will also provide fact testimony regarding the additional efforts that Plaintiff New York City is implementing in an effort to mitigate the potential damage caused by the citizenship question on response rates.

Dr. Lisa Handley is a political scientist who is an independent consultant on voting rights and redistricting. Her clients include the United States Department of Justice, as well as various state and local governments. She has been retained by the U.S. Department of Justice as a testifying expert in five of the ten Voting Rights Act Section 2 cases the Department has filed since 2006. Dr. Handley will present testimony on the use of existing data to enforce the Voting Rights Act, the lack of need or utility to collect citizenship data through the Decennial Census, and the implications of data privacy requirements for the utility of Decennial Census data for Voting Rights Act enforcement. Because the use and consideration of data for redistricting purposes is technical, Plaintiffs believe the evidentiary record will be clearer if Dr. Handley can present these issues prior to cross-examination.

    For the foregoing reasons, Plaintiffs request that they be permitted to present the direct testimony of the foregoing six witnesses live.

Respectfully submitted,

BARBARA D. UNDERWOOD
Attorney General of the State of New York

By: */s/ Elena Goldsten*
Elena Goldstein, *Senior Trial Counsel*
Matthew Colangelo
  Executive Deputy Attorney General
Ajay Saini, *Assistant Attorney General*

Office of the New York State Attorney General
28 Liberty Street
New York, NY 10005
Phone: (212) 416-6201
elena.goldstein@ag.ny.gov

Attorney for the *State of New York* Plaintiffs

ARNOLD & PORTER KAYE SCHOLER LLP
AMERICAN CIVIL LIBERTIES UNION

By: */s/ John A. Freedman*

Dale Ho
American Civil Liberties Union Foundation
125 Broad St.
New York, NY 10004
(212) 549-2693
dho@aclu.org

Andrew Bauer
Arnold & Porter Kaye Scholer LLP
250 West 55th Street
New York, NY 10019-9710
(212) 836-7669
Andrew.Bauer@arnoldporter.com

Sarah Brannon*
American Civil Liberties Union Foundation
915 15th Street, NW
Washington, DC 20005-2313
202-675-2337
sbrannon@aclu.org
* *Not admitted in the District of Columbia;*
practice limited pursuant to D.C. App. R.
49(c)(3).

John A. Freedman
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue, N.W.
Washington, DC 20001-3743
(202) 942-5000
John.Freedman@arnoldporter.com

Perry M. Grossman
New York Civil Liberties Union Foundation
125 Broad St.
New York, NY 10004
(212) 607-3300 601
pgrossman@nyclu.org

Attorneys for the *NYIC* Plaintiffs

4